88-1132

Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MARTIN A. FINN, Petitioner,

v.

CHEVRON, U.S.A., INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 3, 1989

QUESTIONS PRESENTED

1. In a case between an oil company and a gas station owner under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801 et seq., does a federal court of appeals impermissibly disregard the trial court's findings of fact in violation of Fed. R. Civ. P. 52(a), by overruling the trial court's finding that the station owner (the franchisee) gave notice to the oil company (the franchisor) of certain contract violations, where the trial court's finding was not "clearly erroneous" and was supported by substantial evidence?

2. Does the decision of the court of appeals, allowing an oil company to terminate a gas station owner for

contract violations which previously had been accepted and sanctioned by the company, without notice that the violations would no longer be accepted, fail to give effect to the Congressional purpose supporting the PMPA, and thereby conflict with the decisions of this Court requiring purposive interpretation of statutory enactments?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MARTIN A. FINN,

Petitioner,

v.

CHEVRON, U.S.A., INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Martin A. Finn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceedings on July 15, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 851 F.2d 1227, and is reprinted in the appendix hereto, p. A-1, infra. The Ninth Circuit's judgment and order denying rehearing are reprinted in Appendix C hereto.

The memorandum and oral decisions of the United States District Court for the Western District of Washington (Rothstein, D.J.) have not been reported. They are reprinted in Appendix B hereto.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, the respondent brought this suit in the Western District of Washington. The petitioner brought counterclaims which were also within federal question jurisdiction under 28

U.S.C. § 1331. Final judgment was entered on March 12, 1986.

The respondent appealed on April 10, 1986 and the petitioner cross-appealed on April 21, 1986. A supplemental judgment, awarding costs and attorneys' fees, was entered by the District Court on May 6, 1986, and the respondent again appealed on May 9, 1986.

On July 15, 1988, the Ninth Circuit entered a judgment and an opinion reversing in part and affirming in part the Western District's decisions[1] and on October 5, 1988, the Ninth Circuit entered its order denying the petition for rehearing.

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[1] Mr. Justice Kennedy, then a circuit judge, heard the argument in this case on September 9, 1987, but did not take part in the deliberations and was replaced on the panel due to his appointment to this Court.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The provisions of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C §§ 2801-2806, are reprinted in Appendix D hereto.

STATEMENT OF THE CASE

Since 1975, Martin Finn owned and operated the Federal Way Truck Village, a Chevron truck stop south of Seattle, Washington.[2] (RTI 82).[3] His Dealer Lease and Dealer Supply Contract with

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[2] After the reversal in the Ninth Circuit, Mr. Finn was unable to post a supersedeas bond. Consequently, Chevron has terminated the franchise contract and the lease and has taken over the gas station.

[3] References are to the record before the Court of Appeals.

Chevron (Pltf's Ex. 1, Admitted Fact ("AF") No. 3, ER. 20, Pltf's Ex. 2) required him to purchase and sell only Chevron products.

During a nine-month period in 1982 Chevron repeatedly failed to deliver fuel ordered by Finn, despite Chevron's promises that the fuel would be delivered. This failure was jeopardizing Finn's business. When the customers of a gas station are unable to fill their needs, they will fill up at a competitor's station. If this happens frequently enough, the customers may not return.

Unfortunately Mr. Finn had already been hit hard by arbitrary and discriminatory actions and inaction of the Chevron bureaucracy, including costly failures to repair or replace gasoline

pumps (finally repaired by Chevron after Mr. Finn filed the counterclaims in this case) (CR 139); refusal to disburse security funds (CR 85 at 10; RTI 156, 157; RTI 166; CR 139); belated delivery of lease documents CR 139); and the improper changing of incentive program goals after-the-fact (RTII 71; ER 77).

Despite repeated requests from Martin Finn, Chevron seemed unable to cure the supply problem, and on several occasions Finn was without the gas he needed to sell to customers.

For the survival of his business, Finn made 16 separate purchases during 1982 from another Chevron dealer, who operated a business known as Crown Petroleum. (Rindal Dep., p.8, admitted at RTI 14). It is undisputed that the purchases of fuel from Crown would

violate the terms of the contracts with Chevron, unless Chevron is estopped or otherwise barred by the PMPA from terminating Mr. Finn's franchise and lease.

Each outside purchase was made on an emergency basis, and only after Chevron failed to deliver fuel it had promised. There was no economic advantage to Mr. Finn arising from the outside purchases, as compared to purchasing from Chevron.

In January of 1982, Finn personally handed Chevron's sales representative (a Mr. Westphal) a copy of an invoice or delivery receipt showing these outside purchases. (RTI 95). This meeting was witnessed by three individuals, all of whom testified at trial. (RTI 95). Finn told Westphal that he would purchase outside fuel whenever Chevron was unable

to fill his orders, in order to save his business. Westphal responded "I don't blame you," and did not object at any time. (RTI 118, 125). Finn had every reason to believe that his practice in doing this whenever Chevron could not fill his orders was approved of and accepted by Chevron. (ER. 43).

In April of 1984, Chevron filed this declaratory judgment action against Martin Finn, seeking termination of Finn's franchise, termination of his station lease, and an order in unlawful detainer evicting him from the premises, on the basis that he had violated the Dealer Lease and Dealer Supply Contract by purchasing and commingling non-Chevron fuel. (ER 1, 12-17). Finn answered and counterclaimed, seeking injunctive relief to prevent the termination and eviction,

damages for business losses arising from violation of the PMPA (both directly flowing from the notice of termination and from defaults preceding the notice), damages for intentional infliction of emotional distress,[4] punitive damages, attorney fees and costs under the Petroleum Marketing Practices Act. (ER 7-10).

The central issue before the trial court was whether Chevron's 1984 notice was untimely under the PMPA, 15 U.S.C. § 2802(b)(2). At trial, Westphal at first denied that there was any meeting in January of 1982. (RTI 40). Following the testimony of the witnesses to the meeting, Westphal had to take the stand

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[4] Mr. Finn suffered two stress-induced cardiac arrests, in June of 1982 and August of 1984. (CR 85 at 100; RTI 165; ER 133).

again, and under questioning from the Court, Westphal changed his testimony. He admitted that he had been at the meeting, but he denied remembering that Martin Finn handed him any invoice or other documents. (RTI 178).

After hearing numerous witnesses and receiving numerous documents into evidence, the trial court held for Mr. Finn, concluding that the January, 1982 discussions with Chevron's representative constituted notice to Chevron of Finn's prior and subsequent purchases of outside fuel, and that therefore Chevron had notice of all of the purchases long before the 120-day notice period established by the PMPA.

After a second trial on the issue of damages, the District Court awarded costs and damages to Mr. Finn in the amount of

$ 64,778, and Chevron appealed. Mr. Finn cross-appealed the dismissal of his suit for intentional infliction of emotional distress, the District Court's order limiting proof of economic damages to those suffered subsequent to Chevron's notice of termination, and the District Court's refusal to award punitive damages.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's decision extends the power of the court of appeals beyond the limits set by Fed. R. Civ. P. 52(a) and the decisions of this Court.

The key issue was whether Chevron acquired notice of the violations prior to the 120 day period. It is clear from the opinion that the Circuit Court treated its decision as overruling a legal determination for mere error. Actually the decision was one of fact.

The trial court found:

> Plaintiff's attorney [Chevron] points out that even if there had been approval by Mr. Westphal [Chevron's representative] of the first five Crown purchases, the remaining 11 purchases could not have been approved because they occurred after Mr. Westphal had left that position with Chevron. This argument takes a rather narrow view of what actually occurred between Mr. Westphal and Mr. Finn.
>
> Mr. Finn explained the practice he was going to engage in to Mr. Westphal. He informed Mr. Westphal that on any occasion in which he couldn't get gasoline from Chevron he would go and buy it somewhere else and that he planned to do this whenever Chevron was unable to fill his gas orders. There was no objection from Mr. Westphal. **In fact, it was treated as an acceptable practice.**

ER 43 [Emphasis supplied].[5] The Circuit

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[5] There was also extensive and undisputed evidence that Chevron employees regularly checked the meters on the gasoline tanks ("sticking the tanks") and the "totalizer" readings from each pump. RTI 101-104. These checks would have immediately disclosed a discrepancy between the amount of fuel delivered to Finn and the amount of fuel sold. This

(continued...)

Court's opinion overlooked the factual nature of this issue and reversed the trial court without explanation of how it could be "clearly erroneous". The Circuit Court exceeded the limits of the appellate function:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Fed. R. Civ. P. 52. The critical fact in this case was the date when Chevron had notice of any occurrence that could have provided a basis for termination. Chevron's representative (Westphal) denied that Finn had made the statements, and the trial court (after reviewing all

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[5](...continued)
fact alone makes Chevron's assertion that it did not know about the outside fuel purchases highly questionable indeed.

of the documents and seeing and hearing each of the witnesses) decided not to believe Westphal.

The ability of the trial judge to test the veracity of the witnesses is crucial to the determination of subsidiary facts because they constitute the primary evidence in the case from which ultimate facts are drawn. Augusta Aviation v. United States, 671 F.2d 445, 447 (11th Cir. 1982). The rule that findings of fact must be sustained unless clearly erroneous applies even as to issues decided solely on the basis of documentary evidence or upon inferences from undisputed facts. Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982), cited in Official Comments to Fed. R. Civ. P. 52, 1985 Amendment. Where there

are two permissible views of the evidence, the choice between them cannot be clearly erroneous. Anderson v. City of Bessemer, 470 U.S. 564, 573-74 (1985) (reversing a Court of Appeals conclusion that a District Court's findings of fact were clearly erroneous.)

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo."

Id. at p. 573. This Court has repeatedly admonished that the appellate function does not include reweighing and reinterpreting the evidence. Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982).

> The mere fact that on the same evidence the appellate court might

> have reached a different result does not justify it in setting the findings aside.

9 C. Wright & A. Miller, Federal Practice and Procedure: Civil, §2585, at 733 (1971), citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) and Irish v. United States, 225 F.2d 3, 8 (9th Cir. 1955). The Court has stated that the limits on the power of the court of appeals with respect to factual issues follow from its different function and expertise:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already

> been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'"
>
> . . .
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Anderson v. City of Bessemer, supra at 470 U.S. 574-75 [citations omitted].

The Ninth Circuit's opinion states that it reviews the "facts, viewed in a light most favorable to the prevailing party" (see, Ninth Circuit's opinion at 851 F.2d 1228, Appendix A-3 hereto). However, the opinion proceeds to review the facts of the case in a manner which

is slanted in favor of Chevron.

First, the opinion states that:

> In 1981, Finn experienced difficulties in obtaining deliveries of fuel, attributed to the deregulation of the industry and the limited supplies of gasoline.

Id. Here, the Ninth Circuit is reviewing the facts in **Chevron's** favor. If the court of appeals were to review the facts favorably to Mr. Finn, it would point out that there was testimony (which was believed by the trial judge) that Chevron repeatedly promised to deliver fuel but failed to do so, and its failure was more the result of a careless indifference to Mr. Finn's business needs than due to any supply shortage.

Secondly, the court of appeals' opinion fails to note that there were three witnesses to the critical meeting with Westphal in January of 1982.

Third, the court of appeals' opinion totally fails to mention the inconsistencies in Westphal's testimony, and the fact that Westphal actually changed his testimony regarding his recollection of the meeting with Mr. Finn, after the three witnesses took the stand and contradicted Westphal. The trial judge indicated in her opinion that these unexplained inconsistencies and gaps in Mr. Westphal's testimony were significant to her. Clearly, this is just the type of trial evidence which is totally missed by an appellate court reviewing briefs, transcripts and excerpts of record.

Fourth, the court of appeals' opinion completely glosses over the January 8, 1982 meeting between Westphal and Finn at Finn's gas station.

Fifth, the court of appeals' opinion

totally fails to mention that Finn testified that he advised Westphal of additional fuel purchases by telephone on January 24, 1982 (RTI 95-96), denied by Westphal (RTI 41).

Sixth, in the court of appeals' opinion there is no mention of the meeting between Westphal and Finn at the gas station on April 22, 1982, where Finn advised Westphal of additional purchases (RTI 96).

Seventh, the court of appeals' opinion states incorrectly that "it is undisputed" that no Chevron representative was ever notified of the last eleven purchases, and that Chevron only learned of the last eleven purchases in a deposition in a related lawsuit in December of 1983. See, court of appeals' opinion at 851 F.2d 1229, 1230, reprinted

in Appendix hereto at A-4, A-9. **This is disputed.** Mr. Finn told Chevron that he would purchase outside fuel in the future, whenever Chevron failed to fill his orders, in order to have fuel to meet his customers' needs. Obviously Chevron was aware of each instance in which it failed to deliver fuel to Mr. Finn as promised. The trial court noted that Chevron had to know that by failing to deliver fuel to Finn, it was forcing him to purchase fuel elsewhere, or he would not be able to stay in business.

Eighth, in the court of appeals' opinion there is no mention of the fact that Chevron regularly checked the meters on the tanks and the totalizer readings on each pump. Because of this, Chevron had to have been aware of every discrepancy between the amount of fuel

delivered by Chevron and the amount of fuel pumped by Finn (RTI 101-104).

Ninth, the court of appeals characterizes Mr. Finn's statements to Chevron as "merely a statement of intent." Id. at 1230, A-9 hereto. This is deliberately missing the point: when the obligor of a contract makes such a "statement of intent" to his obligee, this is something more than a "statement of intent", it is a repudiation of the contract, to that extent, i.e., an anticipatory repudiation of the contractual duty to purchase fuel only from Chevron.

In each instance, far from reviewing the facts in the light most favorable to the party prevailing at trial, the court of appeals actually minimized the facts favorable to Mr. Finn so as to favor Chevron. The court of appeals quite

simply reweighed the facts and thereby invaded the province of the trial court in violation of Fed. R. Civ. P. 52(a).

The Circuit Court also disregarded the fact that notice of outside fuel purchases is necessarily notice of misbranding. Here again the Circuit Court's opinion reversed an implicitly factual determination. Under the circumstances of the case, it was a fair inference for the trial court to conclude that Chevron would have known if Finn was changing the logo from Chevron to any other brand, since the logo and tradename appear not only on the pump but on the large signs on the premises, credit card slips, advertising items, yellow pages of the phone books, etc. These are things that cannot quickly or easily be changed. Therefore, if Chevron knew about the

outside purchases, it necessarily knew about the misbranding.

The Circuit Court's opinion discussed a number of cases under the PMPA. These include Gruber v. Mobil Oil Corp., 570 F. Supp. 1088 (E.D. Mich. 1983); Escobar v. Mobil Oil Corp., 522 F. Supp. 593 (D. Conn. 1981); and Walters v. Chevron U.S.A., Inc., 476 F. Supp. 353 (N.D. Ga. 1979), aff'd per curiam, 615 F.2d 1135 (5th Cir. 1980). In each of these cases, a gas station owner committed a string of violations which started prior to the 120 day period but extended into the 120 day period (e.g., violation of hours-of-operation provision in Gruber, storage of unregistered motor vehicles on the premises in Escobar, and failure to maintain the gas station in a clean, safe and healthful manner in

Walters). None of these cases, or any of the other PMPA cases cited by the opinion, are relevant because the gas station owner did not state that he would continue violating the contract or dealer lease in the future. For example, if the plaintiff in Gruber v. Mobil Oil Corp. had stated to Mobil Oil, prior to the 120 day limitation, that in the future he would not abide by the lease provision requiring certain hours-of-operation, then that case would be relevant to this one.

The Circuit Court's opinion quoted from the Escobar case as follows:

> This record does not indicate that Mobil ever abandoned its right to insist on compliance with its franchise agreement, or that it acquiesced in non-compliance.

Escobar v. Mobil Oil, 522 F. Supp. at 601-02, quoted at page 8649 of the

Circuit Court's opinion. Clearly this case is different, since the trial court found that Chevron did acquiesce in Finn's practice and treated it as "acceptable." ER 43.

What distinguishes this case from the other PMPA cases is that, according to **facts** found by the trial court, supported by substantial evidence, Finn told Chevron that he would purchase outside fuel whenever Chevron failed to meet his needs and Chevron "treated it as an acceptable practice." ER 43. The mere fact that the court of appeals would have weighed the facts differently does not justify reversal of the trial judge.

II.

The decision below fails to give effect to the Congressional purpose underlying the PMPA and is in conflict with the decisions of this Court requiring purposive construction of statutory enactments.

The PMPA is remedial legislation and its primary purpose is to protect gas station owners such as Mr. Finn from unreasonable, arbitrary, or discriminatory termination or non-renewal. See 1978 U.S. Code Cong. & Ad. News 873-924. Congress was concerned that the disparity of bargaining power between enormous energy companies and franchisees would result in individual franchisees being crushed by the tremendous power of the oil companies. A number of concerns were identified:

> That franchisee independence may be undermined by the use of actual or threatened termination or non-renewal to compel compliance with franchisor market policies; that gross disparity of bargaining power may result in franchise agreements that amount to contracts of adhesion; and that termination or non-renewal may disrupt the reasonable expectations of the parties that the franchise relationship will be a continuing one.

S.Rep. No. 95-731, 95th Cong. 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 875-77. To the same effect is 123 Cong. Rec. 10386 (1977) (remarks of Rep. Mikva), showing the Congressional purpose to prevent the harsh consequences of sudden or unreasonable termination.

The PMPA, at 15 U.S.C. 2802, prohibits termination or non-renewal of a franchise where the franchisor had "actual or constructive" knowledge of the grounds therefor more than 120 days prior to giving notice of non-renewal or termination. In the decision below, the court of appeals has announced a strict interpretation of the term "constructive knowledge" which favors the oil companies. The decision is that if a gas station owner tells the oil company "I will buy outside fuel, in violation of

the franchise contract, whenever you fail to supply me with the fuel I need to stay in business," the oil company does not thereby have "constructive knowledge" of the ensuing violations.[6] Thus, under the decision of the court of appeals, the oil company is free to ignore the 120-day requirement imposed by Congress as a protection for gas station owners against arbitrary or punitive termination or non-renewal. This interpretation violates Congress' manifest purpose in enacting the PMPA, which was to empower the gas

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[6] Despite, apparently, the hornbook doctrine of anticipatory repudiation. A positive statement by a party to a contract that he will not perform his contractual duties is a positive rejection which will support a termination or refusal to perform by the other party. Regional Enterprises, Inc. v. Teacher's Ins. & Annuity Ass'n, 352 F.2d 768, 775 (9th Cir. 1965) (applying Washington law).

station owners in their relationships with the oil companies, and not the other way around.

In interpreting a statute the courts will always look to the purposes Congress sought to serve. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979). There is no doubt that the PMPA was enacted to protect the dealers:

> Gasoline station operators or franchisees represent one of the oldest franchise relationships in American commerce, and one of the groups most deserving of protection. In the past few years, gasoline retailers have been hit hard by the hundreds of terminations ordered by the major refiners.
>
> * * * *
>
> Most franchisors deal fairly and honestly with their distributors and franchisees, but there are some who are more than willing to let the franchisee take the financial risks and invest the time and money in the project, but are not willing to let him share in the success of the

> venture. Neither the consumer nor the business community is benefited when success in a market becomes a cause for termination.
>
> * * * *
>
> ...the bill helps to restore to that business the essential factor in a fair business relationship -- equal bargaining power.

123 Cong. Rec. 10386 (remarks of Cong. Mikva). The need for the Act was widely recognized:

> Little need exists to again document the need for this legislation. The problems of arbitrary or discriminatory and, at times, unfair or punitive terminations and nonrenewals of franchises have long plagued the marketing of gasoline. A Federal statute is needed to provide meaningful protection in these areas to motor fuel franchises.

123 Cong. Rec. 10383 (remarks of Cong. Dingell).

> Franchisors are often the same multinational oil companies which are so powerful that, at times, even the Federal government cannot control their conduct. Franchisees are commonly the local gasoline retailer who is struggling to

> provide service to his customers. The corner gas station owner is, in many cases, the last element of independent business competition in this industry, which is dominated by giant corporations.

123 Cong. Rec. 10387 (remarks of Cong. Staggers). It is abundantly clear that Congress had no intent to aid the oil companies in disputes with their franchisees:

> There can be little doubt... that in the past threats of termination or nonrenewal have been used to compel franchisees to comply with marketing policies of the franchisor. In practice, actual threats of nonrenewal are not essential to the leverage the prospect of nonrenewal provides over the activities of a franchisee. The prospect is ever present and the franchisee can readily comprehend the implications of departing from the marketing policies of the franchisor, even if in some cases those policies are contrary to the franchisee's economic interests.

123 Cong. Rec. 10387 (remarks of Cong. Whalen) (to the same effect is S. Rep. No. 95-731, 1978 U.S. Code Cong. & Ad.

News 877).

Against this background of legislative history, it seems clear that the court of appeals failed to support the obvious purpose of the statute in its interpretation. The trial court found, as a fact, that Finn told Westphal on several occasions, including January of 1982, that he was going to violate the contract by buying outside fuel whenever Chevron failed to supply him. As we reviewed above, this finding was supported by substantial evidence and therefore is not subject to reversal by the court of appeals, due to the provisions of Fed. R. Civ. P. 52(a). Considering the Congressional purpose underlying the PMPA, surely it must be concluded that Chevron had "constructive knowledge" of the subsequent contract violations at

least as early as January, 1982.

CONCLUSION

For the foregoing reasons we urge the Court to grant certiorari to review the decision of the court of appeals in this matter. We request that the decision be reversed and remanded to the court of appeals for proceedings on the issues on appeal which would then remain.

Respectfully submitted,

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January 3, 1989

APPENDIX A - NINTH CIRCUIT OPINION

CHEVRON U.S.A., INC.,
Plaintiff-appellant,
cross-appellee,

v.

Martin A. FINN, Defendant-appellee,
cross-appellant.

Nos. 86-3807, 86-3757 and 86-3850.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 9, 1987.

Decided July 15, 1988.

Reported at 851 F.2d 1227 (9th Cir. 1988)

Karen J. Vanderlaan, Thomas Huber and Shannon Fitzpatrick, Helsell, Fetterman, Martin, Todd & Hokanson, Seattle, Wash., for plaintiff-appellant, cross-appellee.

Samuel J. Stiltner, John Mucklestone, James R. McLees and William G. Sutell, Hohlbein & Fetty, Seattle, Wash., Gregory O. DeBay, Federal Way, Wash., for defendant-appellee, cross-appellant.

Appeal from the United States District Court for the Western District of Washington.

Before NELSON* and BEEZER, Circuit Judges, and NIELSEN,** Senior District Judge.

PER CURIAM:

Chevron appeals from the order of the district court determining that Chevron's notice of termination of franchise agreement was untimely and awarding costs and damages to Finn in the amount of $64,778. Finn cross-appeals the dismissal by the district court of his claim

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* Judge Nelson was drawn to replace Judge Kennedy. She has read the briefs, reviewed the record and listened to the tape of oral argument held on September 9, 1987.

** The Honorable Leland C. Nielsen, Senior District Judge for the Southern District of California, sitting by designation.

for personal injuries and the court's refusal to award exemplary damages.

The facts, viewed in a light most favorable to the prevailing party, are as follows: Since 1975 Finn has operated a service station in Seattle, Washington. The station is Chevron's largest volume dealer in the south Seattle area. In 1981, Finn experienced difficulties in obtaining deliveries of fuel, attributed to the deregulation of the industry and the limited supplies of gasoline.

On March 28, 1981, Finn met with Chevron retail sales representative, Bill Westphal. At the meeting Finn told Westphal he would purchase his fuel from an outside source when Chevron could not supply his fuel needs.

On May 5, 1981, Chevron and Finn entered into a new Dealer Lease and

Dealer Supply Contract for the term November 1, 1981 through October 31, 1984.

Beginning January 6, 1982, Finn purchased 96,002 gallons of fuel from Crown Petroleum in sixteen separate purchases and deliveries. Finn notified Westphal of the first five deliveries. It is undisputed that neither Westphal, who left his position on February 1, 1982, nor any other Chevron representative was notified of any of the last eleven purchases. The last purchase occurred on October 7, 1982.

On December 21, 1983, Chevron attended the deposition of Joyce Rindal, a Crown Petroleum employee, taken in the course of a related lawsuit. At that deposition, Chevron learned of the last eleven purchases occurring from April 29, 1982

through October 7, 1982.

On February 24, 1984, Chevron issued a notice of termination. The notice stated that the lease was terminated because of Finn's:

> willful adulteration and commingling of Chevron motor fuels with those purchased from a source other than Chevron and [his] sales of non-Chevron motor fuels through Chevron's trademarked equipment.

In April, 1984, Chevron filed a declaratory judgment action against Finn seeking a declaration that Finn had violated the Dealer Lease and Dealer Supply Contract, and that the lease was lawfully terminated by Chevron's notice under Section 2802 of the Petroleum Marketing Practices Act (the Act) (codified at 15 U.S.C. § 2802 [1982]). Finn answered and counterclaimed seeking injunctive relief, damages, punitive damages and attorneys' fees and costs

under the theory that Chevron's notice of termination was untimely and the termination caused him personal injuries. The trial was bifurcated into liability and damages phases.

The district court determined that Chevron's notice of termination was untimely because Chevron did not issue the notice within 120 days of acquiring actual or constructive knowledge of the grounds for termination as required by Section 2802(b)(2)(A)(i) of the Act. The court awarded Finn damages of $5,878 for improper "charge backs" by Chevron of rental rebates; $18,900 plus interest for lost profits from Finn's inability to participate in Chevron's variable rental program; and $40,000 for attorneys' fees and costs. The district court refused to award exemplary damages and dismissed

Finn's claim for personal injuries.

Section 2802(b)(2)(A)(i) of the Act states:

> (2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:
>
> (A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure --
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given....

The district court concluded that Chevron first acquired actual or constructive knowledge of the grounds for termination more than 120 days prior to the termination notice. Thus, the notice was untimely. That knowledge was in the form of a conversation between Finn and

Westphal on March 28, 1981 wherein Finn informed Westphal that he was going to purchase non-Chevron products whenever he was unable to secure Chevron products to fill his needs, and Westphal responded, "I don't blame you." The fact that Finn informed Westphal of the first five purchases, but not of the last eleven is inconsequential, as the district court found that the March 28, 1981 conversation constituted notice to Chevron of "the practice he was going to engage in."

[1] We disagree. At most, this exchange constituted notice of an intent by Finn to purchase non-Chevron fuel in the future. It did not amount to actual or constructive knowledge of the grounds for terminating the lease, i.e., the actual purchase and commingling of non-Chevron fuel and the sale of that fuel

through Chevron's trademarked equipment. That is the fact the knowledge of which must be acquired within 120 days of termination. Therefore, this conversation does not constitute knowledge justifying termination, nor does it constitute a timeliness bar to Chevron's notice of termination.

[2] Further, while it is true Finn informed Westphal of the first five purchases of non-Chevron fuel, it is undisputed that Finn did not inform any Chevron employee of the last eleven purchases. Nor did anyone at Chevron know of Finn's failure to cover up the Chevron logo when selling non-Chevron fuel. These last eleven purchases were each a separate violation of the lease agreement and constituted separate grounds for terminating the lease.

Gruber v. Mobil Oil Corp., 570 F. Supp. 1088 (E.D. Mich. 1983); Escobar v. Mobil Oil Corp., 522 F. Supp. 593 (D. Conn. 1981); Walters v. Chevron U.S.A., Inc., 476 F. Supp. 353 (N.D. Ga. 1979); aff'd per curiam, 615 F.2d 1135 (5th Cir. 1980).

In Gruber, plaintiff failed to abide by the hours-of operation provision of the lease and failed to operate the station in a clean, safe and healthful manner. Mobil sent Gruber a notice of termination. Gruber argued the notice was untimely because Mobil first acquired knowledge of the violation more than 120 days prior to the notice of termination. The court rejected Gruber's argument, reasoning that the 120-day provision:

> is intended to 'preclude a franchisor from basing termination or non-renewal upon old and long forgotten events. [citation

> omitted]....' When the alleged failure to conform with the lease is ongoing, occurring within and prior to the 120-day limitation, then the breaching event is not considered stale, but rather, viewed as a new ground for terminating the relationship each time the franchisee fails to comply.

Gruber, 570 F. Supp. at 1092.

In Escobar, plaintiff sought an injunction to restrain the franchisor from terminating the franchise. The district court granted the injunction because the notice was inadequate, but the court stated that Mobil would otherwise have been legally justified in terminating plaintiff's franchise due to plaintiff's repeated and ongoing violations of the lease provision prohibiting the storage of unregistered motor vehicles on the premises. Escobar, 522 F. Supp. at 601.

Plaintiff argued that Mobil knew of

the violations for at least seven years and failed to act. The court rejected the argument stating:

> This record does not indicate that Mobil ever abandoned its right to insist on compliance with its franchise agreement, or that it acquiesced in noncompliance.
>
> * * * * *
>
> Each instance of noncompliance was a separate failure to comply within the meaning of the section 2802(b)(2)(A)(i) of the Act....

Escobar, 522 F. Supp. at 601-02.

In Walters, a district court again addressed the issue of an ongoing repeated violation of a lease provision requiring maintenance of the station in a clean, safe and healthful manner. The court acknowledged the first violations occurred more than 120 days prior to the notice of termination, and plaintiff argued the notice was, therefore, untimely. The court disagreed, prefer-

ring to treat each instance of noncompliance as a separate violation. Walters, 476 F. Supp. at 357. See also, Wisser Co. v. Mobil Oil Corp., 730 F.2d 54 (2d Cir. 1984); Amoco Oil Co. v. D.Z. Enterprises, Inc., 607 F. Supp. 595, 600-01 (E.D. N.Y. 1985).

This approach is also consistent with the legislative history of the Act which states that the time limitations exist to prevent a franchisor from terminating based upon "old and long-forgotten events," and are not intended to stop a termination based upon a future event which constitutes a ground for termination, even if such future event is a repeat occurrence of an event with respect to which the previous exercise of termination was waived. S. Rep. No. 95-731, 95th Cong., 2d Sess. 33, reprinted

in 1978 Code Cong. & Admin. News 873, 892. See Walters, 476 F. Supp. at 359.

As these cases indicate, where there are multiple violations of the lease, each violation constitutes a separate ground for termination. Therefore, each of the last eleven purchases made without notice to Chevron constituted a violation of the lease.

[3] While it is true the last eleven purchases occurred more than 120 days prior to the notice of termination, the 120-day provision is triggered not by the violation itself, but by the acquisition by the franchisor of "actual or constructive knowledge of such failure." 15 U.S.C. § 2802(b)(2)(A)(i).

Chevron did not acquire knowledge of the last eleven purchases and commingling of non-Chevron fuel and the sale of that

fuel through Chevron's trademarked equipment until well within the 120-day period. Chevron learned of the purchases at the deposition of Joyce Rindal on December 21, 1983, and issued the notice of termination 65 days later, on February 24, 1984. The district court's conclusion that Chevron's notice was untimely under Section 2802(b)(2) of the Act is reversed.

Since the notice of termination was timely, no damages could have flowed from such termination. Therefore, the award of damages to plaintiff is reversed, and the district court's dismissal of plaintiff's claim for personal injuries is affirmed.

REVERSED IN PART AND AFFIRMED IN PART.

APPENDIX B - DISTRICT COURT OPINIONS

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHEVRON, INC.,
Plaintiff,

vs.

MARTIN A. FINN,
Defendant.

NO. C84-546R

ORAL DECISION
BY THE HONORABLE BARBARA J. ROTHSTEIN
NOVEMBER 19, 1984

* * * * * *

I am going to give you my ruling and what I am going to do is make this ruling in lieu of findings and conclusions if it ends up being satisfactory to counsel that I do that. The rules provide that the transcript of my oral decision can serve in lieu of findings and conclusions.

If on the other hand counsel feel that it is incomplete in any way, I want them to feel comfortable letting me know and they can prepare the findings and conclusions based on the transcript, if they are more comfortable going that way.

Basically the Court finds that this trial really comes down to a determination of a very narrow factual question, which in turn will resolve the legal issue in the case.

The legal issue, as the Court sees it and as presented clearly in the briefs, is whether plaintiff Chevron gave its notice to defendant Finn within the 120-day period provided in 15 USC 2802(b), (a) or (c).

It is required that a notice of termination be given within 120 days of a violation of the lease terms. If

Chevron's knowledge of the violation arose considerably after the 120-day period, Chevron would still be entitled to terminate the lease.

So the factual issue really comes down to when did Chevron first obtain knowledge of the violations of the lease. That Finn did indeed buy non-Chevron products and sell them without changing the Chevron names on the pumps and at his station is clear from the facts. That that is indeed a violation of the terms of the lease is also clear from the facts and really is essentially undisputed.

What really is in dispute is whether or not Finn informed Chevron's retail sales representative, Mr. Westphal, of the fact that he was intending to purchase non-Chevron products and whether Mr. Westphal, either tacit or otherwise,

gave approval to that procedure. In short, whether or not Westphal approved of this practice.

The Court has listened to the testimony of all the witnesses and finds that the weight of the evidence establishes that Finn did indeed inform Westphal that he was going to purchase non-Chevron products whenever he was unable to secure Chevron products to fill his customers' needs.

The evidence is clear that Chevron on several occasions was unable to provide Finn with the gas he needed to meet his business needs. This failure was jeopardizing Finn's business.

It is clear that the customers of an ongoing gas station who are unable to fill their needs will go elsewhere and that if this happens frequently enough

the station would clearly be in danger of losing their business entirely.

Despite repeated requests from Mr. Finn Chevron seemed unable to cure this problem and on several occasions Finn was without the gas he needed. It was entirely reasonable and to be expected that Mr. Finn would turn elsewhere to fill his needs.

The record is clear that he did so only on an emergency basis. There was no economic advantage to him buying his gas elsewhere. Indeed, he always tried to purchase the gasoline he needed from Chevron before turning to Crown.

It makes perfect sense that given the nature of his business and his customers' needs he would tell Westphal of his problems, and indeed he had told Westphal of his problems. It also makes

perfect sense that he would go on and explain to Westphal exactly how he intended to solve these problems and indeed it was only logical, and the Court believes, that Westphal would respond with the "I don't blame you" remark that is attributed to him.

Three individuals testified that in January they were called to be witnesses to Finn's handing Westphal an invoice concerning purchase of products from Crown, rather than from Chevron. The Court finds it impossible to believe that these three individuals were all lying under oath to merely help a friend.

It is far more logical that Mr. Westphal knew of the problem, knew of Finn's plans and did not object to Finn filling his unfilled orders on an emergency basis.

Actually, Mr. Westphal's own testimony had gaps that remain unexplained and inconsistent to the Court. First, Mr. Westphal denied that there was any meeting in January. He later recalled that he had been there, but he doesn't remember being handed anything. He explains that he went there to give documents to Mr. Finn.

Secondly, Mr. Westphal gave no explanation concerning the long distance phone call made by Mr. Finn to Mr. Westphal in the spring after Westphal had moved to Bend. It is agreed that the call was a request by Finn to Westphal to testify on Finn's behalf in a contemplated lawsuit. There was no explanation as to why Mr. Finn would even assume that Mr. Westphal would be a friendly witness to Finn against Chevron. The fact of the

matter is that explanation becomes perfectly plausible if one sees that in fact Mr. Westphal had been sympathetic to Mr. Finn all along and had recognized the problems that he had had in procuring gasoline when he needed it.

Plaintiff's attorney points out that even if there had been approval by Mr. Westphal of the first five Crown purchases, the remaining 11 purchases could not have been approved because they occurred after Mr. Westphal had left that position with Chevron. This argument takes a rather narrow view of what actually occurred between Mr. Westphal and Mr. Finn.

Mr. Finn explained the practice he was going to engage in to Mr. Westphal. He informed Mr. Westphal that on any occasion in which he couldn't get

gasoline from Chevron he would go and buy it somewhere else and that he planned to do this whenever Chevron was unable to fill his gas orders. There was no objection from Mr. Westphal. In fact, it was treated as an acceptable practice.

I think Mr. Finn had every reason to believe that his practice in doing this whenever Chevron could not fill his orders was indeed approved and accepted by Chevron.

The Court notes that Mr. Westphal was Chevron's representative. He was the person with whom Mr. Finn dealt with on a regular basis. He was the primary person from Chevron that Mr. Finn dealt with.

I think it little becomes Chevron more than a year after the last Crown purchase to now assert that these purchases form an appropriate basis for

terminating Mr. Finn's lease.

Chevron's claim of unlawful detainer must be denied. Chevron's notice of termination of the lease is deemed invalid.

Now, it was the Court's understanding that the other issues before the Court, together with this portion of the case, would be defendant's contention that Chevron had somehow acted with malice or willfully in terminating the lease and that these were the two issues that would be tried in this portion of the bifurcated case, and if I'm correct on that I am going to go ahead and rule on that portion of the case.

I find that the defendant has failed to establish to the Court's satisfaction that Chevron's actions in seeking to terminate the case were willful or

malicious and, therefore, that portion of defendant's counterclaim is denied.

* * * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE HONORABLE BARBARA J. ROTHSTEIN,
UNITED STATES DISTRICT JUDGE

CHEVRON, INC.,
Plaintiff,

vs.

MARTIN A. FINN,
Defendant.

Cause Number
C84-546R

COURT'S DECISION ON DEFENDANT'S COUNTERCLAIM
February 24, 1986

The court finds and rules as follows: 1) defendant's claim for lost management is not compensable; 2) defendant is awarded $5,878.00 for March and April charge backs; 30 defendant is awarded $18,900.00 plus interest as to the variable rental program; 4) Chevron

will renew defendant's lease without further order of the court.

Defendant shall file his motion for attorneys' fees no later than 6 March, 1986; plaintiff shall file its response by 24 March 1986; defendant shall file his reply on 27 March 1986; this matter is hereby noted on the court's calendar for 28 March 1986.

A written copy of the transcript of this proceeding shall serve in lieu of written findings and conclusions. Counsel shall review the transcript and notify the court of any alterations required.

cc: counsel of record

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHEVRON, INC.,
Plaintiff,

vs.

MARTIN A. FINN,
Defendant.

Cause Number
C84-546R

**Oral Decision by the
Honorable Barbara J. Rothstein
on February 24, 1986**

9:30 AM

*****

THE COURT: Good afternoon, counsel. Counsel, the Court has written out its opinion, and I am delivering it orally in lieu of findings of fact and conclusions of law, as the rules provide. If counsel feel there's more that the Court should specify, I'll be happy to do so, so that

we can avoid having to come back and do findings and conclusions. I really don't think there are enough issues in the case to warrant elaborate findings and conclusions. If either of you feel differently, you can let me know.

I also will not go into great detail sketching out for counsel the background of the case and how we came to be where we were, because probably many people know it, counsel and the Court are thoroughly familiar with it.

The matter came before the Court for hearing in order to determine what the damages were that were caused to defendant Finn by Chevron's wrongful termination of his lease of the Federal Way Truck Village. The parties in their pretrial order narrowed the issues to four remaining issues. This was partial-

ly as a result of an earlier Court ruling that the damages had to be actual damages that could be attributed directly to the lease termination. By that ruling the Court eliminated many issues from the case, and the parties then narrowed them to four issues.

The four areas in which Finn claims damages are as follows: First, attorneys' fees and accounting costs. The parties agreed with the Court that this matter would not be addressed as an evidentiary matter for the Court to rule on at this time, but rather, would be determined by means of affidavits and, if necessary, further briefing by the parties. At the end of this hearing we will establish a schedule.

The second is the issue of whether Mr. Finn is entitled to damages caused by

his lost management time and by the time he spent assisting his attorneys in preparing and presenting this lawsuit. The Court will address that claim at this time.

It is clear that Mr. Finn has spent many hours defending this lawsuit and resisting Chevron's wrongful attempt to terminate his lease. However, the defendant has shown the Court no authority in support of the proposition that Finn's time spent in defending his lawsuit is compensible. The Court is mindful of the fact that defendant was unable to separate out between the time spent defending this lawsuit and any management time actually lost that proved detrimental to the running of the truck stop.

Unlike attorneys' fees and costs, a

litigant's own time is not covered under the PMPA. The general rule is that such time is not compensible, and, as far as the Court can determine, there is no countervailing authority under the PMPA that would change the ruling for purposes of this particular statute. Therefore, the Court finds that defendant is not entitled to recover for his time spent defending this lawsuit.

Turning to the third claim, defendant has claimed $5,878 as damages due to the chargebacks and rebates for the months of March and April of 1984. For the month of March, Chevron argues the chargeback was appropriate, because Chevron had indeed made a mistake and was entitled to take back some of the rebate given to the defendant for that month. As for April, Chevron admits there was an

error and that Finn is entitled to a correction, but Chevron argues that the Court cannot order this correction, because this error has nothing to do with the lease termination.

The Court finds and holds for the defendant on both the March and April rebates. First, the Court strenuously disagrees with plaintiff's position that this has nothing to do with the lease termination. The parties were to continue this lease on a fair and equitable basis, and the rebate problem demonstrates to the Court a continuation of a pattern of careless disregard on the part of Chevron for defendant's business needs. It is undisputed that the size of the rebate to a dealer depended on the base gallonage figure of the corresponding month in the previous year. There is

no question that it was absolutely vital that the dealer have this figure in advance, so as to enable him to benefit from the rebate by permitting him to competitively reduce his prices. It is also undisputed that Finn did not receive corrections for the month of March and April until after he would have already made his crucial pricing decisions.

It is perfectly clear to the Court that if Chevron is unable to get its information to the dealer in a timely and correct manner, it should not be allowed to pass the penalty for that to the dealer. Finn made repeated requests to Chevron to find out what his rebates would be and what the gallonage figures that Chevron had for him were, so that he could make intelligent business decisions based on that information.

Chevron was repeatedly unable and or unwilling to furnish Finn these figures when asked for them. If indeed when finally provided they turned out to be wrong, it is neither right nor equitable that Chevron correct its mistakes at Finn's expense.

The last claim is for the amount that Finn could have gained had he been allowed to participate in the variable rental program that Chevron instituted during the pendency of these proceedings. Chevron concedes that Finn should have been afforded an opportunity to participate in the variable grant program, and the only remaining issue for the Court is to resolve what Finn would have gained from that program over the past months, had he participated.

The Court has reviewed the testimony

of Mr. Winn and Mr. Schlosser, and has reviewed the relevant exhibits, with special attention to Exhibit A-8 and Mr. Winn's spreadsheets. After careful consideration, it is apparent to the Court that Chevron's figures, i.e., those of Mr. Winn, must be rejected. It is clear to the Court that the key calculation from which all else follows is the valuation of the premises, and Winn's methodology does not appear to the Court to follow the methodology set forth in A-8. Nor, in fact, was Mr. Winn on the stand able to offer any real basis for why he used the methodology he used. He himself did not really tie it into A-8. The detailed explanation for Winn's methodology came from Chevron's attorney, not from Mr. Winn himself.

A-8 does not say that the premises

shall be valued based upon what gallonage it has sold, or some estimate by somebody as to what gallonage could be sold or should be sold from those premises. The Court finds Winn's methodology unpersuasive. It is mindful of the fact that the methodology was never run by Finn prior to its use at trial, and there was nothing agreed upon between the parties and negotiated between the parties as to what methodology and what valuation should be used.

The Court then turns to defendant's proposed figures, and has problems with those figures, also. Defendant would have the Court accept an average of three different ways of calculating the amount Finn should have received. Based on the testimony of Mr. Schlosser, it is clear that as to the first and third alternates

that were proposed to the Court, there is really no rational basis for choosing either one of those. The only alternate that recommends itself to the Court is defendant's alternate two, and that has the rational approach of using as its base lease amounts contained in a relatively recently negotiated lease.

The Court is cognizant of the fact that this lease was not negotiated with the new variable rent program in mind, but given the choices presented to the Court, this alternative comes closest to providing the Court with a reasonable basis for arriving at what benefits Mr. Finn might have gained, had he been permitted to engage in the program.

And so the Court finds that Finn is entitled to $18,900 dues for not participating in the program, and the Court

finds in the exercise of its discretion that Finn should be entitled to interest on that amount.

As for the remaining issue of renewal, which really was not addressed by the parties except briefly in passing, it was the Court's understanding that Chevron was really not resisting the Court's order concerning renewal, but that they were really waiting to see the outcome of this case so as not to be construed to have waived any rights of appeal.

MR. HUBER: That's correct, your Honor.

THE COURT: So I do not see any need for the Court to issue any kind of an injunction or order to enforce its order. It's my understanding that Chevron is going to comply, and lease will be

renewed once this matter is wrapped up today. We'll set a briefing schedule on attorneys' fees, if that's necessary. ...

* * *

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHEVRON, INC.,
Plaintiff,

vs.

MARTIN A. FINN,
Defendant.

Cause Number
C84-546R

ORDER AWARDING ATTORNEY FEES
[Entered May 5, 1986]

THIS MATTER comes before the Court on defendant's motion for an award of attorneys' fees. Defendant's attorneys have filed affidavits in support of fees in the amount of $93,098.00 and costs in the amount of $3,349.58. Plaintiff vehemently objects to defendant's figures.

Plaintiff urges the Court to reject

defendant's motion for fees on the following grounds: (1) that defendant's attorney McLees was not admitted to practice before this court during much of the time in which he worked on this case; (2) that defendant's attorney McLees did not use an adequately reliable method of recording and verifying his hours; (3) that defendant's attorneys have included time spent on Finn v. Clerget, a King County Superior Court case; (4) that defendant's attorneys have charged attorney time for performing non-attorney functions; (5) that defendant's attorneys unnecessarily doubled up in their services throughout this case; (6) that, in general, defendant's attorneys' fees are unreasonable and unwarranted given the nature of this case, the amount of the recovery and the issues on which the

plaintiff prevailed; (7) that the required costs include items not allowable under the Petroleum Marketing Practices Act or other statutes.

The court has reviewed the memoranda and other materials submitted by the parties. The court is also fully familiar with the relevant file and records, with the nature of the parties' discovery and the motions heretofore presented, and with the conferences, trials and other court proceedings in this action. The court is able to assess the complexity of the issues, the difficulty of the trial, and the nature and quality of the attorney work. In the exercise of its discretion, the court finds and rules as follows:

First, Attorney McLees was not admitted to practice before this court

during a substantial portion of his work on this case. Mr. McLees has furnished the court with no adequate reason for his failure to comply with such a vital requirement.

Second, Attorney McLees failed to maintain contemporaneous time records. It appears that Attorney Mucklestone authorized McLees to calculate McLees's billings based on Mucklestone's time slips. This is a questionable practice, especially because McLees has adjusted his fees by memory. He ultimately claims substantially more in fees than Mucklestone claims. To adjust fees by memory defeats the purpose of contemporaneous time records.

Third, defendant's attorneys have furnished insufficient justification for including time spent on the Clerget case

in their billing in the present action.

Finally, defendant's attorneys have not adequately responded to plaintiff's concerns that defendant's requested award includes time spent in messenger/clerical functions and includes costs not allowable under any applicable statute.

The court concludes that the fee request before the court is not a valid approximation of the appropriate fee award. The court does not believe that an opportunity for further substantiation would resolve this problem. Defendant's attorneys have already had more than adequate opportunity to provide substantiation to the court.

One alternative would be for the court to reject defendant's request altogether for lack of adequate substantiation. The court declines to adopt

this alternative because the court believes that the court's informed estimate is based on the court's knowledge of this case, an evaluation of the novelty and complexity of the issues, the expertise of counsel, the degree of preparation, the length and difficulty of the trial, the recovery, and the number of issues prevailed upon.

In the court's opinion, the issues involved in this case were not exceptionally complex or novel. The trial itself was neither lengthy nor difficult and required no special expertise on the part of counsel. The amount of time consumed by counsel's preparation is unremarkable except for the extent to which it reflects constant duplication of attorney effort. Any complexity in the case was introduced by defendant's addition of

numerous claims and issues which were either later dismissed or not prevailed upon.

Evaluating the work done, the results achieved, and all the above factors, the court finds that a reasonable award for attorneys' fees and costs in this case is $40,000.

IT IS NOW, THEREFORE, ORDERED that defendant is entitled to an award of $40,000 for attorneys' fees and costs.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington, this 2nd day of May, 1986.

/s/
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX C - NINTH CIRCUIT JUDGMENT AND ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHEVRON U.S.A., INC.,
Plaintiff-Appellant/
Cross-Appellee,

vs.

MARTIN A. FINN,
Defendant-Appellee/
Cross-Appellant.

Nos. 86-3807, 86-3757, 86-3850

JUDGMENT

Filed and entered 7/15/88

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is, AFFIRMED IN PART AND REVERSED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHEVRON U.S.A., INC.,
Plaintiff-Appellant/
Cross-Appellee,

vs.

MARTIN A. FINN,
Defendant-Appellee/
Cross-Appellant.

Nos. 86-3807
86-3757
86-3850

[Entered October 5, 1988]

ORDER DENYING PETITION FOR REHEARING

Before: NELSON and BEEZER, Circuit Judges, and NIELSEN,* District Judge

The petition for rehearing is DENIED. Each party to bear its own costs.

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* The Honorable Leland C. Nielsen, Senior United States District Judge, Southern District of California, sitting by designation.

APPENDIX D - STATUTES INVOLVED

TITLE 15--COMMERCE AND TRADE

Chapter 55--Petroleum Marketing Practices

Subchapter I--Franchise Protection

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract--

(1)(A)(i) between a refiner and a distributor,

(1)(A)(ii) between a refiner and a retailer,

(1)(A)(iii) between a distributor and another distributor, or

(1)(A)(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or

distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(1)(B) The term "franchise" includes--

(1)(B)(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(1)(B)(ii) any contract pertaining

to the supply of motor fuel which is to be sold, consigned or distributed--

(1)(B)(ii)(I) under a trademark owned or controlled by a refiner; or

(1)(B)(ii)(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(1)(B)(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any

person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who--

(6)(A) purchases motor fuel for sale, consignment, or distribution to another; or

(6)(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate

consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver

such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include--

(13)(A) any failure which is only technical or unimportant to the franchise relationship; or

(13)(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any

franchise relationship, a failure to reinstate, continue, or extend the franchise relationship--

(14)(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(14)(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(14)(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce--

(18)(A) between any State and any place outside of such State; or

(18)(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth,

territory, or possession of the United States.

Pub. L. 95-297, title I, § 101, June 19, 1978, 92 Stat. 322, 15 USC § 2801

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal

Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may--

(a)(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(a)(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was

entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if--

(b)(1)(A) the notification requirements of section 2804 of this title are met; and

(b)(1)(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(b)(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(b)(2)(A) A failure by the

franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure--

(b)(2)(A)(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(b)(2)(A)(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(b)(2)(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the fran-

chise, if--

(b)(2)(B)(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(b)(2)(B)(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(b)(2)(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and

the franchisor first acquired actual or constructive knowledge of such occurrence--

(b)(2)(C)(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(b)(2)(C)(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(b)(2)(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if--

(b)(2)(D)(i) such agreement is

entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(b)(2)(D)(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(b)(2)(D)(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(b)(2)(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise

entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if--

(b)(2)(E)(i) such determination--

(b)(2)(E)(i)(I) was made after the date such franchise was entered into or renewed, and

(b)(2)(E)(i)(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(b)(2)(E)(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(b)(2)(E)(iii) in the case of leased marketing premises--

(b)(2)(E)(iii)(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(b)(2)(E)(iii)(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(b)(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(b)(3)(A) The failure of the

franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if--

(b)(3)(A)(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(b)(3)(A)(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(b)(3)(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if--

(b)(3)(B)(i) the franchisee was promptly apprised of the existence and nature of such complaints following

receipt of such complaints by the franchisor; and

(b)(3)(B)(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(b)(3)(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(b)(3)(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or

renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if--

(b)(3)(D)(i) such determination is--

(b)(3)(D)(i)(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(b)(3)(D)(i)(II) to materially alter, add to, or replace such premises,

(b)(3)(D)(i)(III) to sell such premises, or

(b)(3)(D)(i)(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor

despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(b)(3)(D)(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(b)(3)(D)(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either--

(b)(3)(D)(iii)(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(b)(3)(D)(iii)(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition

As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as--

(c)(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(c)(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(c)(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(c)(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise--

(c)(4)(A) of the duration of the underlying lease, and

(c)(4)(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of non-

renewal);

(c)(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(c)(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(c)(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(c)(8) failure by the franchisee to pay to the franchisor in a timely manner

when due all sums to which the franchisor is legally entitled;

(c)(9) failure by the franchisee to operate the marketing premises for--

(c)(9)(A) 7 consecutive days, or

(c)(9)(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(c)(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(c)(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(c)(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)--

(d)(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(d)(2) if such termination or nonrenewal is based upon an event

described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

Pub. L. 95-297, title I, § 102, June 19, 1978, 92 Stat. 324, 15 USC § 2802

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions

The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship--

(a)(1) under a trial franchise; or

(a)(2) under an interim franchise.

(b) Definitions

For purposes of this section--

(b)(1) The term "trial franchise" means any franchise--

(b)(1)(A) which is entered into on or after June 19, 1978;

(b)(1)(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(b)(1)(C) the initial term of which is for a period of not more than 1 year; and

(b)(1)(D) which is in writing and states clearly and conspicuously--

(b)(1)(D)(i) that the franchise is a trial franchise;

(b)(1)(D)(ii) the duration of the initial term of the franchise;

(b)(1)(D)(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the

initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(b)(1)(D)(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(b)(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which

permits such transfer or assignment, without regard to any provision of the franchise.

(b)(3) The term "interim franchise" means any franchise--

(b)(3)(A) which is entered into on or after June 19, 1978;

(b)(3)(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(b)(3)(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal--

(b)(3)(C)(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(b)(3)(C)(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(b)(3)(D) which is in writing and states clearly and conspicuously--

(b)(3)(D)(i) that the franchise is an interim franchise;

(b)(3)(D)(ii) the duration of the franchise; and

(b)(3)(D)(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of

this title are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements. If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship--

(c)(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(c)(2) under any interim franchise, at the conclusion of the term of such interim franchise, if--

(c)(2)(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(c)(2)(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

Pub. L. 95-297, title I, § 103, June 19, 1978, 92 Stat. 328, 15 USC § 2803

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor

Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship--

(a)(1) in the manner described in subsection (c) of this section; and

(a)(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section--

(b)(1)(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(b)(1)(B) in the case of leased marketing premises, such franchisor--

(b)(1)(B)(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins--

(b)(1)(B)(i)(I) on the date notification was posted or personally delivered, or

(b)(1)(B)(i)(II) if later, on the date on which such termination or nonrenewal takes effect; and

(b)(1)(B)(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(b)(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall--

(b)(2)(A) furnish notification to the franchisee not less than 180 days

prior to the date on which such termination or nonrenewal takes effect; and

(b)(2)(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification

Notification under this section--

(c)(1) shall be in writing;

(c)(2) shall be posted by certified mail or personally delivered to the franchisee; and

(c)(3) shall contain--

(c)(3)(A) a statement of intention to terminate the franchise or not to

renew the franchise relationship, together with the reasons therefor;

(c)(3)(B) the date on which such termination or nonrenewal takes effect; and

(c)(3)(C) the summary statement prepared under subsection (d) of this section.

(d) Preparation, publication, etc., of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(d)(2) In the case of summaries

required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

Pub. L. 95-297, title I, § 104, June 19, 1978, 92 Stat. 329, 15 USC § 2804

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action.

If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such

franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of--

(a)(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(a)(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b)(1) In any action under subsec-

tion (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(b)(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if--

(b)(2)(A) the franchisee shows--

(b)(2)(A)(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(b)(2)(A)(ii) there exist sufficiently serious questions going to

the merits to make such questions a fair ground for litigation; and

(b)(2)(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(b)(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(b)(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel

continuation or renewal of the franchise relationship if such action was commenced--

(b)(4)(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(b)(4)(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(b)(4)(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

(c) Burden of proof; burden of going forward with evidence

In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title.

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to

franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled--

(d)(1)(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(d)(1)(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(d)(1)(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case

the court, in its discretion, need not direct that such fees be paid by the franchisor.

(d)(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(d)(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsec-

tion (a) of this section with respect to—

a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor

demonstrates to the satisfaction of the court that--

(e)(1)(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business--

(e)(1)(A)(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(e)(1)(A)(ii) to materially alter, add to, or replace such premises,

(e)(1)(A)(iii) to sell such

premises,

(e)(1)(A)(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(e)(1)(A)(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(e)(1)(B) the requirements of section 2804 of this title have been complied with.

(e)(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness

fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this title.

Pub. L. 95-297, title I, § 105, June 19, 1978, 92 Stat. 331, 15 USC § 2805

§ 2806. Relationship of statutory provisions to State and local laws

(a) To the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation

thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

Pub. L. 95-297, title I, § 106, June 19, 1978, 92 Stat. 332, 15 USC § 2806

No. 88-1132

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARTIN A. FINN, Petitioner,

v.

CHEVRON U.S.A., INC., Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

INTRODUCTION -- THE ISSUES IN THE DISTRICT COURT

This suit involves the termination of a service station operation by a refiner because of the dealer's violations of federal law, state criminal law, and breach of contractual obligations. The dealer was selling fuel to the motoring public under the guise that it was Chevron fuel, when in fact it was not. The legal issue at trial was whether the refiner's termination notice to the dealer was timely under the requirements of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. 2801 *et seq.* (Petition Appendix D). The PMPA provides that a notice of termination must be given within 120 days after the refiner learns of the facts constituting the ground for termination.

The District Court found that the notice to the dealer was not timely. The Court of Appeals, based on admitted facts, concluded that the District Court determination was erroneous, and reversed.

II.

STATEMENT OF THE CASE

Petitioner Martin Finn (Finn) was an independent service station operator leasing a station from Respondent Chevron U.S.A., Inc. (Chevron), under the terms of a Dealer Lease and a Dealer Supply Contract, each with an effective date of November 1, 1981. (Pltf's Ex. 1 & 2, Excerpt of Record (ER) pp. 95-129.) On sixteen separate occasions during the period January 6 through October 17, 1982, Finn purchased a total of 96,002 gallons of gasoline and diesel fuel from Crown

Petroleum, an independent jobber not connected with Chevron. (Chevron's Ex. 4, ER 134.) Finn put this fuel into Chevron's tanks, commingling it with Chevron fuel, pumped it out through Chevron's pumps, and sold this fuel under Chevron's logos and trademarks, *i.e.*, passed it off to the motoring public as Chevron fuel. (Pretrial Order, Admitted Facts 11-18, ER 21 & 22.)

These practices violated sections 32(1) and 43(a) of the Lanham Trademark Act, 15 U.S.C. §§ 1114(1) and 1125(a); and violated two Washington criminal law provisions, RCW 9.16.040, which prohibits displaying goods with a false trademark, and RCW 9.16.080, which prohibits the sale of improperly labeled petroleum products. (Appendix A to this brief contains these statutory provisions.)

These actions also violated paragraph 6(b) of Finn's Dealer Lease, which prohibits using Chevron trademark equipment for non-Chevron products; and violated three provisions of Finn's Dealer Supply Contract: 2(b), which requires compliance with all applicable federal and state laws; 4(a), which prohibits the sale of non-Chevron products under the Chevron trademark and prohibits commingling of products; and 4(b), which prohibits use of Chevron's signs in connection with the sale of non-Chevron products. (ER 99, 114 and 116.)

The actions were grounds for termination of the Dealer Lease under paragraph 7(b)(5), which provides for termination for "willful adulteration, commingling, mislabeling or misbranding of

motor fuels or other violations by Dealer of trademarks utilized by Chevron;" and paragraph 7(b)(8), which provides for termination for "unlawful, fraudulent or deceptive acts or practices or criminal misconduct by Dealer relevant to the operation of the premises." (ER 100.) The actions were grounds for termination of the Dealer Supply Contract under paragraph 7(b)(4), for knowingly failing to comply with federal or state laws relevant to the use or operation of the premises; 7(b)(5) for willful adulteration, commingling, mislabeling or misbranding of motor fuels or violation of Chevron trademarks; and 7(b)(7), which provides for termination for engaging in unlawful, fraudulent or deceptive acts or practices or criminal misconduct. (ER 119.)

At trial there was no dispute with regard to these violations by Finn. In the Admitted Facts section of the Pre-Trial Order, Finn acknowledged that all pumps, tanks and containers at the station were supplied by Chevron; that he understood that such pumps, tanks and containers were to be used solely for the storing, handling and dispensing of Chevron products; that during the period January 6, 1982 through October 7, 1982 he received delivery of sixteen loads of fuel from Crown Petroleum totaling 96,002 gallons; that he put this fuel into Chevron's tanks and sold it through pumps bearing the Chevron trademark; that the fuel was commingled with Chevron fuels; and that when selling the fuel he did not use any device to block out the Chevron

trademark. (Pre-Trial Order, Admitted Facts 11-18; ER 21-22.)

At trial there was no issue concerning Chevron's right to terminate Finn for the above-described violations. The District Court Judge stated in her oral decision:

> That Finn did indeed buy non-Chevron products and sell them without changing the Chevron names on the pumps and at his station is clear from the facts. That that is indeed a violation of the terms of the lease is also clear from the facts and really is essentially undisputed.

Petition for Certiorari, Appendix B, page B-3.

The legal issue at trial was whether Chevron's notice to terminate Finn was given in timely fashion. The PMPA provides that a failure by the franchisee (dealer) to comply with any provision of the franchise is a ground for termination

"if the franchisor first acquired actual or constructive knowledge of such failure . . . not more than 120 days prior to the date on which notification of termination . . . is given." 15 U.S.C. 2802(b)(2)(A)(i). (Petition, Appendix D, pp. D-11 and D-12.)

Chevron's evidence showed that no one at Chevron had notice or knowledge concerning Finn's outside fuel purchases until December 1983. The three Chevron retail sales representatives responsible for working with Finn each testified that they never received any notice or had any knowledge. (Westphal, Transcript of Record, Vol I, TRI 37-50; Downs TRI 51-53; and Lettich TRI 54-60.) Chevron Area Retail Manager William Wynn testified that he had no knowledge until early December

1983 when he was advised by by Chevron's landlord (Chevron was leasing the property and subleasing to Finn) that there was information Finn had purchased fuel on the outside. (TRI 62-63.) Wynn questioned Finn about such purchases. Finn denied them. (TRI 63.) Confirmation and details concerning the purchases were received December 21, 1983, during a deposition of a Crown Petroleum employee in an unrelated lawsuit. (TRI 17 and 29; Chevron's Ex. 4, Summary of Purchases, ER 134; Appendix B to this brief.)

Chevron's termination notice was delivered to Finn on February 28, 1984. (Pre-Trial Order, Admitted Fact 19; Pltf's Ex. 3, ER 22 and 127.) Thus the termination notice, according to Chevron's evidence, was timely under the require-

ments of the PMPA, since it was given within 120 days after Chevron received notice of Finn's violations of the contracts.

Finn testified that on March 28, 1981 he had a meeting with Chevron representative Westphal concerning Chevron holding up a delivery because of Finn's credit problems, and Finn testified the conversation included his statement that he "might" get fuel elsehwere if he could not get it from Chevron. (RTI 86-91.) This conversation was over seven months prior to the November 1, 1981 effective date of the Dealer Lease and Dealer Supply Contract at issue in this case, and over nine months prior to Finn's first outside purchase of fuel on January 6, 1982. Finn also testified that he informed Westphal

concerning the first five outside purchases of fuel which occurred January 6 and 24, February 15 and 17, and April 22, 1982. (TRI 94-96, 111-113; Summary of Purchases, Chevron's Ex. 4, Appendix B to this brief.)

It is undisputed, however, that Chevron never was advised about the next 11 purchases of outside fuel which occurred between April 29 and October 7, 1982. Finn's deposition testimony, read into the record at trial, is as follows:

> A. From six to sixteen no, I did not.
>
> Q. We are talking about the deliveries six through sixteen which appear on Exhibit 4?
>
> A. Yes.
>
> Q. Your're telling me as to each of those deliveries you did not inform anyone at Chevron?

A. Right.

(June 20, 1984 Deposition of Finn, p. 81, lns. 13-19; Read by Trial Court, TRI 14-29.)

The trial court concluded that even though no notice had been given to Chevron of the last 11 purchases of outside fuel, Chevron could not terminate Finn based on such purchases because Finn over a year earlier had advised a Chevron representative that he "might" make future outside purchases of fuel, and thus, under the PMPA, Chevron's termination notice was untimely. The Court of Appeals determined that such conclusion was erroneous and reversed.

III.

FINN'S MISSTATEMENT OF FACTS IN THE PETITION

1. On page 4 of his petition for a Writ of Certiorari Finn asserts that after

the Ninth Circuit reversal Chevron terminated the contracts. The fact is that Finn terminated the contracts. Appendix C to this brief is a true copy of Finn's October 20, 1988 notice to Chevron by which he terminated the Dealer Lease and Dealer Supply Contract.

2. On page 5 in the petition Finn asserts he purchased outside fuel because Chevron repeatedly failed to deliver fuel to him. Finn fails to mention that his difficulty in getting fuel from Chevron was the result of Chevron's reluctance to deliver fuel to him on credit, because of Finn's continued delivery of nonsufficient fund checks to Chevron in payment for fuel, 31 checks in all, each of which was in the thousands of dollars. (TRI:86, 110-111, and 167.)

3. On page 5 of the Petition Finn asserts that the contracts required him to purchase and sell only Chevron products. Both contracts, however, had provisions for the selling of other companies' fuels. (Dealer Lease, ¶ 6(b), ER 99; Dealer Supply Contract, ¶ 2(a), ER 114.) The only restriction was placing another company's fuel in Chevron's tanks and selling it through Chevron's pumps using Chevron logos. Chevron's Exhibit A-5 is a memorandum from Finn's files, prepared by a Finn employee, which sets forth Chevron's policy that outside fuel could be purchased so long as steps were taken to protect the integrity of Chevron's tanks and the Chevron logos were covered. (ER 135-136; RTI 182.)

4. On page 6 of the Petition Finn asserts that Crown Petroleum was another

Chevron dealer. Admitted Fact 12 in the Pre-Trial Order recites that Crown Petroleum does not distribute its own products, purchasing products from other companies for resale. (ER 21.) Chevron's area retail manager testified that Chevron does not sell to Crown Petroleum. (RTI 62.) The general manager of Crown Petroleum testified it purchased its fuel from Disoro, Tosco, PRI, Union, Shell, Arco and Texaco. (RTI 138-139.)

5. On pages 7 and 8 in his Petition Finn states that the meeting at which he told the Chevron representative he might purchase outside fuel whenever Chevron was unable to fill his orders took place in January 1982, at the time such outside purchases commenced. Finn testified at trial, however, that this conversation

took place March 28, 1981, almost 10 months prior to the first such delivery. (RTI 86, lns. 19-24, and p. 90, ln. 25 through p. 91, ln. 2.)

6. Finally, on page 8 in his Petition, Finn states that in January 1982 he handed a Chevron sales representative a copy of an invoice "showing these outside purchases," implying Chevron was given notice then of all 16 purchases. Only the first two of the 16 purchases occurred in January 1982. (*See* Summary, Appendix B.) Finn testified at trial that the January meeting involved only the invoice for the first purchase. (TRI Finn June 20, 1984 Deposition read at trial, pp. 72-74.) Finn admitted he told no one at Chevron about deliveries 6 through 16. (Finn June 20, 1984 deposition, p. 81, read at

trial, TRI 14, quoted on page 11 of this brief.)

IV.

REASONS FOR DENYING THE PETITION

A. The Court Of Appeals Heeded The Limitations On Appeals Set Forth In Federal Civil Rule 52(a).

With regard to appellate review of a non-jury trial Civil Rule 52(a) provides:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The District Court found, on disputed evidence, that Finn advised Chevron concerning his first five purchases of non-Chevron fuel. The Court of Appeals accepted this finding of fact. With regard to the next 11 purchases of outside fuel, the four Chevron representatives

testified that they had no knowledge, and Finn admitted that he told no one at Chevron concerning such purchases. In the face of this undisputed evidence the District Court concluded, based on Finn's testimony that 10 months prior to the first purchase he told a Chevron representative he might make purchases of outside fuel, that Chevron was on notice as to all such future purchases. In so concluding the District Court ignored settled case law that each new breach of a contract by a dealer is a new event justifying termination under the PMPA. (The case law is discussed below at pp. 22-24.) The Court of Appeals correctly disagreed with the District Court's conclusion and held, based on the undisputed facts, that Chevron's first notice of the 11 sub-

sequent purchases was on December 21, 1983, when the Crown Petroleum deposition took place, and thus Chevron's February 28, 1984 notice was within the 120 days required by the PMPA.

This ruling by the Court of Appeals is supported on a number of grounds.

1. The District Court's conclusion was clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95, 68 S. Ct. 525, 92 L. Ed. 746, 766 (1948).

2. The District Court's conclusion was a ruling on a mixed question of

fact and law which is freely reviewable on appeal. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 267 (3d Cir. 1970), *cert. denied* 90 S. Ct. 1696, 398 U.S. 905, 26 L. Ed. 2d 64; *Official Creditors Committee of Fox Markets Inc. v. Ely*, 337 F.2d 461, 467 (9th Cir. 1964), *cert. denied*, 85 S. Ct. 1342, 380 U.S. 978, 14 L. Ed. 2d 272; and *U.S. v. Gypsum, supra*.

3. The District Court's ruling concerning notice is not a finding on basic facts but an inference derived from the basic facts. Where facts are undisputed and credibility of witnesses is not involved, and the trial court's ruling is an inference drawn from the facts, the appellate court may freely draw different inferences. *United States v. O'Brien*, 273 F.2d 495 (3d Cir. 1959). Where the trial

court's holdings are "ultimate facts" which "are simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, they are subject to review by this Court free from the restraining influence of the 'clearly erroneous' rule . . . ." *Bullock v. Tamiami Trail Tours, Inc.*, 266 F.2d 326, 330 (5th Cir. 1959).

4. The District Court's conclusion was based on an erroneous interpretation of law, as discussed below at pp. 22-24. Where the trial court has operated under a misapprehension of the law that affects its findings, the "clearly erroneous" standard no longer is applicable. *U.S. v. Gypsum, supra.* at 333 U.S. 394; *TMT Trailer Ferry v. Anderson*, 390 U.S.

414, 444-445 (1968) 20 L. Ed. 2d 1; *Ritter v. Morton*, 513 F.2d 942 (9th Cir. 1975), *cert. denied*, 423 U.S. 947, 96 S. Ct. 362, 46 L. Ed. 2d 281 (1975).

5. The District Court's holding also was a conclusion of law and the "clearly erroneous" test does not apply. *District of Columbia v. Seven-Up Washington, Inc.*, 214 F.2d 197 (D.C. Cir. 1954), *cert. denied*, 74 S. Ct. 851, 347 U.S. 989, 98 L. Ed. 1123; and *American National Bank of Austin v. United States*, 421 F.2d 442 (5th Cir. 1970), *cert. denied*, 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 4 (1971).

B. <u>The Trial Court's Holding Concerning Notice Was Based On A Misapprehension Of Law; Affirmance Of Such Ruling By the Court Of Appeals Would Be In Conflict With Decisions By Other Federal Courts</u>.

The District Court treated Finn's March 28, 1981 statement that he might

purchase outside fuel in the future as constructive notice of all future violations involving commingling and misbranding of fuel. It is well established, however, that under the PMPA each separate violation of a dealer franchise agreement is an event which commences the running of a new 120 day period for termination. *Gruber v. Mobil Oil Corp.*, 570 F. Supp. 1088 (E.D. Mich. 1983); *Escobar v. Mobil Oil Corp.*, 522 F. Supp. 593 (D. Conn. 1981); *Walters v. Chevron U.S.A., Inc.*, 476 F. Supp. 353 (N.D. Ga. 1979). In *Amoco Oil Co. v. D.Z. Enterprises, Inc.*, 607 F. Supp. 595 (E.D.N.Y. 1985) the dealer, like Finn, sold non-Amoco gasoline through the Amoco branded pumps violating the Amoco trademark, violating both the Landham Act and

state law. The court stated: "Where there are repeated occurrences of the violative conduct, each new event is a ground for termination." Finally in *Wisser Co., Inc. v. Mobil Oil Corp.*, 730 F.2d 54 (2d Cir. 1984) passing off gasoline from another refiner as Mobil's was ground for termination of the franchise and the court quoted from the legislative history: "[T]he time limitations are not intended to stop a franchisor from exercising termination . . . based upon a future event which constitutes a ground for termination . . . , even if such future event is a repeat occurrence of an event with respect to which the previous exercise of termination . . . rights was waived." 1978 U.S. Cong. & Ad. News at 892.

On page 22 of his petition, Finn argues that his March 26, 1981 conversation with the Chevron representative was an "anticipatory repudiation" of his contractual duties. It is difficult to understand how one can repudiate a contractual obligation by stating that he "might" violate it in the future. It is clear that a statement of intent is not proof that the actor will follow through. *United States v. Washington Water Power Co.*, 793 F.2d 1079, 1082 (9th Cir. 1986). Finally, both the Dealer Lease and the Dealer Supply Contract contained an express provision that Chevron's waiver of any breach or default was "not to be deemed to be a waiver of any other or continuing breach or default . . . ." (ER 101 and 120.)

C. The Court of Appeals Gave Effect To The Congressional Purpose Underlying The Petroleum Marketing Practices Act.

At page 27 Finn argues that the primary purpose of the PMPA is to protect gas station owners from unreasonable, arbitrary or discriminatory termination. Chevron does not dispute this statement. Finn then goes on to assert that in some way the Court of Appeals decision allows an oil company to ignore the 120 day notice requirement. The Court of Appeals decision, however, does just the opposite. It enforces the requirement of the 120 day notice. The opinion also enforces the congressional intent, set forth at p. 24 in this brief, that the "time limitations are not intended to stop a franchisor from excercising termination . . . based upon a future event which constitutes a ground for termination."

V.

CONCLUSION

The District Court was clearly erroneous in concluding that Finn's statement to Chevron's representative, that he might purchase outside fuel in the future, was notice to Chevron concerning 11 future instances in which Finn violated federal law, state law, and contractual provisions, by commingling fuels and by selling outside fuels to the motoring public under the guise that it was Chevron's product. Further, for the reasons set forth on pp. 20-22 of this brief, such District Court conclusion was freely reviewable by the Court of Appeals. Finn's petition, therefore, fails to meet the criteria for issuance of a writ of certiorari, and must be denied.

Respectfully submitted.

DATED this 2nd day of January, 1989.

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By Thomas W. Huber
Thomas W. Huber

Attorneys for Chevron
U.S.A., Inc.

9TWH3/84-0314

APPENDIX A

Statutory Provisions Violated By Petitioner Finn

1. Sections 32(1) and 43(a) of the Lanham Trademark Act 15 U.S.C. #1114(1) and 1125(a)

§ 1114. Remedies; infringement; innocent infringement by printers and publishers

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) of this section, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

§ 1125. False designations of origin and false descriptions forbidden

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

2. Title 9, Revised Code of Washington, Crimes and Punishments; Chapter 9.16, Brands and Marks, Crimes Relating to:

9.16.040 Displaying goods with false trademark. Every person who shall knowingly sell, display or advertise, or have in his possession with intent to sell, any goods, wares, merchandise, mixture, preparation or compound having affixed thereto any label, trademark, term, design, device, or form of advertisement lawfully filed for record in the office of the secretary of state by any person, corporation, association or union, or the exclusive right to the use of which is guaranteed to such person, corporation, association or union under the laws of the United States, which label, trademark, term, design, device or form of advertisement shall have been used or affixed thereto without the written authority of such person, corporation, association or union, or having affixed thereto any forged or counterfeit representation, likeness, similitude, copy or imitation thereof, shall be guilty of a misdemeanor. [1909 c 249 § 345; RRS § 2597.]

9.16.080 Sales of petroleum products improperly labeled or by wrong grade. It shall be unlawful for any person, firm or corporation:

(1) To use, adopt, place upon, or permit to be used, adopted or placed upon, any barrel, tank, drum or other container of gasoline or lubricating oil for internal combustion engines, sold or offered for sale, or upon any pump or other device used in delivering the same, any trade name, trademark, designation or other descriptive matter, which is not the true and correct trade name, trademark, designation or other descriptive matter of the gasoline or lubricating oil so sold or offered for sale;

(2) To sell, or offer for sale, or have in his or its possession with intent to sell, any gasoline or lubricating oil, contained in, or taken from, or through any barrel, tank, drum, or other container or pump or other device, so unlawfully labeled or marked, as hereinabove provided;

(3) To sell, or offer for sale, or have in his or its possession with intent to sell any gasoline or lubricating oil for internal combustion engines and to represent to the purchaser, or prospective purchaser, that such gasoline or lubricating oil so sold or offered for sale, is of a quality, grade or standard, or the product of a particular gasoline or lubricating oil manufacturing, refining or distributing company or association, other than the true quality, grade, standard, or the product of a particular gasoline or oil manufacturing, refining or distributing company or association, of the gasoline or oil so offered

APPENDIX B

Summary of Finn's Outside Purchases of Fuel, Plaintiff's Ex 4, ER 134

Summary of Ex. 4 (PLTF)

	Crown Invoice Number	Delivery Date	Gallons of Product G-Gas D-Diesel	Order # on Receipt or Invoice	Order # on Source Document	Meter Ticket # on Receipt or Invoice	Meter Ticket #	Source	Supplier
1.	0477	1-6-82	9000 D.	4869	4869	745787	745787	PRI	ARCO
2.	0541	1-24-82	9000 D.	84	84	84	745788	PRI	
							101172	Tosco	
3.	116-0671	2-15-82	2000 G. 7900 D.	116	116	91846	91846	Tosco	
4.	T-91851-52	2-17-82	3401 G. 4501 G. 2001 D.	121	121 121	91851 91852	91851 91852	Tosco Tosco	
5.	0992	4-22-82	4500 D.	9994	0994	R16015	E16015	PRI	
6.	222-1027	4-29-82	3400 G. 2000 G. 4500 D.	222	222	92685	92685	Tosco	
7.	7021-1016	5-11-82	1500 G. 4800 D.	7021	7021	21312 030244	21312 030244	PRI	Shell
8.	PRI-1069	5-21-82	4500 D.	PRI	PRI	16127	16127	PRI	
9.	1119	5-24-82	2350 G. 2150 G.	119		17378 17379	17378 17379	PRI PRI	
10.	1138	6-1-82	4500 D.	1138		16049	16049	PRI	
11.	7206-1167	6-7-82	1000 G. 3000 G.	7206	7206	066604 083497	066604 083497	PRI PRI	Shell Shell
12.	1304	7-20-82	3000 G. 2500 G.	1304		18585 18585	18585 18585	PRI PRI	
13.	1455	8-14-82	500 G. 2000 G.	1455		543450 575095	543450 575095	Union Union	Union Union
14.	1457	8-15-82	2500 G.	1457		543468 575101	543468 575101	Union Union	Union Union
15.	1117	8-25-82	5000 D.	1117		707116 287832	707116 287832	Texaco Texaco	Texaco Texaco
16.	1723	10-7-82	4499 D.	1723		292426	292426	Texaco	Texaco

Total Gallons: 96,002

Diesel: 60,200

Gas: 35,802

APPENDIX C

Finn's October 20, 1988 Notice to Chevron Terminating the Dealer Lease and the Dealer Supply Contract

Truck Village, Inc.
1511 S. 348th
Federal Way, Washington 98003

October 20, 1988

TO: Chevron, and its marketing representative, Larry Hills

Dear Sirs:

Pursuant to Section (7) of the Dealer Lease that has been in effect since November 1, 1981, you are hereby given this notice of my termination of the Dealer Lease and the Supply Contract for the premises at 1511 S. 348th, Federal Way, Washington, 98003, effective at 0001 hrs, October 31, 1988.

Any further communications following that time may be made through my attorney, Gregory O. DeBay, 2755 S.W. 323rd St., Federal Way, WA 98023, phone number (206) 838-4404.

Yours very truly,

Martin A. Finn